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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CARMEN M. SUAREZ,

Petitioner,

v.

MARGARET M. HECKLER,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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May 31, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

1. Whether the U.S. District Court for the District of Puerto Rico properly held that Petitioner, who was disabled by the same impairment as of date of her application as that which previously caused her to be under a disability prior to her attainment of age 22, was entitled to Child Insurance Benefits?

2. Whether the Secretary of Health and Human Services, Respondent, erred in concluding that a person seeking Adult Child Insurance Benefits must suffer from a disability which began prior to her 22nd birthday and continued uninterrupted until she applied for benefits?

3. Whether the Court below should have rendered a decision clarifying Adult Child Insurance Benefits?

4. Whether an employee of the Social Security Administration should be allowed to represent the Secretary of Health and Human Services signing appeals without due appointment as counselor?

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IN THE

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OCTOBER TERM, 1984

No. 84-

CARMEN M. SUAREZ,

Petitioner,

v.

MARGARET M. HECKLER
SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner, CARMEN M. SUAREZ, respectfully prays to this Honorable Court that a Writ of Certiorari be granted to review the ORDER of the United States Court of Appeals for the First Circuit entered in this case on February 25, 1985. The Petition for Rehearing is denied on April 3, 1985. She was disabled before age 22 in the account of her father, wage earner, José A. Suárez, Social Security Number 581-03-0194A, who was receiving Social Security Benefits for Old-Age Retirement Insurance Benefits until December 22, 1981, when he died. Respondent, Secretary of Health and Human Services, Margaret M. Heckler, determined that Petitioner is not disabled within the meaning of the Act and that her disability did not exist continuously from before she attained age twenty-two

through the date of her application. The U.S. District Court for the District of Puerto Rico reversed the Secretary's final decision.

OPINION BELOW

The ORDER of the Court of Appeals, not yet published appears in the Appendix hereto. (A-4, 13 pages). On April 03, 1985 the Petition for Rehearing was denied. (A-5). On December 15, 1983 the U.S. District Court for the District of Puerto Rico rendered an Opinion and Order reversing the Secretary's decision. (A-9, 7 pages).

JURISDICTION

The ORDER of the Court of Appeals for the First Circuit was entered on February 25, 1985. (A-4, 13 pages). A timely Petition for Rehearing was denied on April 03, 1985. This court's jurisdiction is invoked under 28 U.S.C.A. Section 1254(1); 42 U.S.C.A. Section 405(g), (1983) and Local Rule 23.

CONSTITUTIONAL, STATUTORY AND REGULATIONS PROVISIONS INVOLVED

The Constitutional, Statutory and Regulations provision which are relevant to the decision of this case; are Amendments V. and XIV of the United States Constitution; Amendment V, provide in part:

"No person shall. . . be deprived of life, liberty or property, without due process of law. . . ."

And Amendment XIV, provide in part:

". . . . Nor deny to any person within its jurisdiction the equal protection of the laws. . ."

Judicial review of cases arising under Title II of the Social Security Act, as amended, is provided for in Section 205(g) of the Act, 42 U.S.C.A. Section 405(g)(1983) in pertinent part provide:

"(g) . . . . The judgment of the Courts shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. . . ."

Section 202(d)(1) of the Social Security Act, as amended, 42 U.S.C.A. 402(d)(1),(1983) in pertinent part provide:

"(d) Child Insurance Benefits

(1) Every Child (as defined in Section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully currently insured individual, if such child -

(A) has filed application for Child's Insurance Benefits

(B) at the time such application was filed was unmarried. . . .

(C) was dependent upon such individual. . .

(D) . . . .

(E) . . . .

(G) . . . . if such child was under a disability (as so defined) at the time she attained the age of 18, ... or prior to the time she attained (or would attain) the age of 22, or, subject to Section 423(e) of this title.

Section 216(e) of the Social Security Act, 42 U.S.C.A. Section 416(e)(1983) in pertinent part provide:

"(e) Child

"The term 'Child' means (1) the child or adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceeding the day on which application for child's insurance benefits is filed or. . . .

Section 223(d)(1)(A) of the Social Security Act, 42 U.S.C.A. Section 423(d)(1)(A)(1983), provide in part:

"(d)(1) The term 'disability' means -

'(A) Inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or . . . ."

Congress authorizes the promulgation of regulations to the Secretary of Health and Human Services, who in-turn, delegates the authority to the Department of the Social Security Administration. The Social Security Administration promulgates regulations as part IV and publishes in the Federal Register under 20 C.F.R. Sections 404, et seq.; which are not inconsistent with the Act.

Section 404.350 of the Secretary's Regulations (20 C.F.R. Section 404.350,(1983), which in pertinent part provide:

Who is entitled to Child's Benefits.

"You are entitled to child's benefits on the earnings record of an insured person who is entitled to old-age or disability benefits or who has died if -

(a) you are the insured person's child . . . .;

(b) you are dependent on the insured . . . .;

(c) you apply;

(d) you are unmarried; and

(e) you are under age 18, you are 18 years old or older and have a disability that began before you became 22 years old, or . . . .;

STATEMENT OF THE CASE

This Petitioner seeks to review the ORDER of the Court of Appeals for the First Circuit reversing the Decision from the U.S. District Court for the District of Puerto Rico.

On July 30, 1926 Petitioner was born.

On April 28, 1981 Petitioner, Carmen M. Suarez, filed an application for Social Security Disability Insurance Benefits as an Adult Disabled Child based on the account of her father, José A. Suarez, who was receiving Social Security Benefits, for Old Age Insurance Benefits, until December 22, 1981, when he died.

At the Administrative level the claim was denied.

On December 15, 1983 the U.S. District Court for the District of Puerto Rico entered OPINION AND ORDER that it is clear that the same disability was present in the claimant prior to attaining age 22, as on April 1981, when she applied for the benefits.

(A-9, 7 pages).

Miss Suárez suffered her first serious depressive episode at around age twelve. Two additional depressive episodes, at around age eighteen, culminated in claimant's hospitalization in September of 1944 at the Ontario Hospital (now London Psychiatric Hospital) in Canada, where the disorder was diagnosed as manic depressive psychosis. Miss Suárez underwent electroshock and insulin treatments while at Ontario and some improvement. She was transferred on January 1, 1945 to the Institute of Living in Hartford, Connecticut, where she also received shock treatments and was institutionalized for a full year until January of 1946.

(A-4, p. 2, 3).

When Miss Suárez returned to Puerto Rico, she was under psychiatrist treatment by Dr. Luis M. Morales García, a well known psychiatrist in Puerto Rico, since she was twelve (12) years old. He died in the year 1970. Unable to obtain such medical evidence in the year 1982.

On July 27, 1972 Miss Suárez was hospitalized at the Hato Rey Psychiatric Hospital, Hato Rey, Puerto Rico. She was discharged on September 23, 1972. Diagnosis:

"Schizophrenia, Schizo-affective type, chronic."

Congressional policy in amending the Social Security Act, Title II, is to give protection and looks for the welfare of the wage earner's family. *Mathews v De Castro* 429 U.S. 181, 185-186; 97 S. Ct. 4311, 434-435; 50 L.ED. 2nd. 389.

On August 01, 1956, Congress enlarged the class of persons entitled to a Child Disability Insurance Benefits to include those, who were under a disability which began before age 18. For such a person the benefits continued beyond the age of 18, but terminated upon marriage.

In October 1958 Congress adopted the amendment that provide that marriage would not terminate a child's disability benefits if the child married a person who was also entitled to benefits under the Act. 72 Stat. 1030-1031. *Califano* v *Jobst*, 434 U.S. 47, 98 S.Ct. 95, 54 L.Ed. 2d. 228, (1977).

On October 30, 1972, Congress enacted Public Law 92-603 liberalizing the Adult Disabled Child provision by amending Sections 202(d)(1)(B), 202(d)(1), 202(d)(6) and 202(S), 42 U.S.C.A. Sections 402(d)(1)(B), 402(d)(1), 402(d)(6) and 402(S) of the Social Security Act (1983) thereby extending Childhood Disability Benefits to the Disabled Adult Child of an insured deceased parent or a parent eligible for Old-Age or Disability Insurance Benefits if the son or daughter became totally disabled after age 18 but before age 22. For application for benefits filed after September 30, 1972, the effective date of this amendment was January 1973.

Section 108, 86 Stat. 1329 (1972).

At the time of above amendment Petitioner's father was still working and not receiving any benefits from the Social Security Administration.

It is not until April 28, 1981 that the Petitioner complied with the Social Security Act by filing her application for Disabled Adult Child's Insurance Benefits. Section 202(d)(1)(A), 42 U.S.C.A. Section 402(d)(1)(A), (1983).

There is no time limitation in establishing disability for the adult disabled child. Entitlement commences at the time the parent files for benefits. Normal retroactivity; of 12 months prior to filing the application.

There is no waiting period for adult disabled children's benefits. The child can become entitled to monthly benefits upon meeting the age and disability requirements. 42 U.S.C.A. Section 402(d)(1).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. WHETHER THE U.S. DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO PROPERLY HELD THAT PETITIONER, WHO WAS DISABLED BY THE SAME IMPAIRMENT AS OF DATE OF HER APPLICATION AS THAT WHICH PREVIOUSLY CAUSED HER TO BE UNDER A DISABILITY PRIOR TO HER ATTAINMENT OF AGE 22, WAS ENTITLED TO ADULT DISABLED CHILD INSURANCE BENEFITS?

This is an action brought under 42 U.S.C.A., Section 405(g) for review of the final decision of the Secretary of Health and Human Services which affirmed the denial of disability benefits by the Administrative Law Judge and the Appeals Council.

The District Court accepted that the Administrative Law Judge erred in requiring a period of continuous disability from the time when the Plaintiff first became disabled to the date when she filed for benefits.

The Administrative law Judge found that the evidence of record failed to "prove that at least on July 1948 and thereafter she was suffering from a severe impairment."

The Court cited the case of *Axe* v *Harris* (E.D. Pa. 1980), 503 F. Supp. 1049, the Court stated:

"Under subsection (d) of Section 42 U.S.C.A. Section 402(d), there is no requirement that claimant's disability, which had to have begun before age 22 and be present at time application

was filed, be continuous from age 22 until time application for benefits was filed." *Reading* v *Mathews*, (C.A.7th., 1976), 542 F.2d. 993.

2. WHETHER SECRETARY OF HEALTH AND HUMAN SERVICES, RESPONDENT, ERRED IN CONCLUDING THAT A PERSON SEEKING ADULT CHILD INSURANCE BENEFITS MUST SUFFER FROM A DISABILITY WHICH BEGAN PRIOR TO HER 22ND BIRTHDAY AND CONTINUED UNINTERRUPTED UNTIL SHE APPLIED FOR BENEFITS?

The case of *Johnson* v *Secretary of H.H.S.* (6th. Cir.,1982), 679 F.2d. 605, the Court stated:

"Where Child Insurance Benefits claimant was unmarried child of deceased wage earner, had to establish that he was under disability which began before his 22nd. birthday and that such disability lasted or was expected to last for continuous 12-month period."

42 U.S.C.A. Sections 402(d)(1) and 423(d)(1)(A).

Above case is applicable to the instant case.

3. WHETHER THE LOWER COURT SHOULD HAVE RENDERED A DECISION CLARIFYING ADULT CHILD DISABILITY BENEFITS?

The Court below stated:

". . . . the A.L.J. did not know, for example, that claimant's sister had lived under the same roof with claimant for most of her life. As for counsel's performance, or lack of it, we have already noted our dissatisfaction. . . we admonished the same attorney to desist from bringing frivolous appeals. . ." (A-4, page 12).

The testimony of the claimant's sister, Yolanda, was not obtained because it was accumulative. She was present at the hearing held on March 8, 1982.

After the case was denied by the Administrative Law Judge we obtained an affidavit from Yolanda and from a neighbor, an ex-District Judge, Rolando Martínez. Also include a letter from claimant's father dated May 15, 1981, before he died. Such documents were treated as lay evidence pursuant to Section 12:00(B)(4), Mental Disorders, Appendix 1, Subpart P, Section IV of the Secretary's Regulations (1983), in pertinent part provide:

"(4) . . . . reports from educational institutions and information furnished by public welfare agencies or other reliable, objective sources should be considered as additional evidence."

Lay evidence is considered to be any evidence from a non-medical source. Testimony of friends, neighbors statements. *Thorne* v *Weinberger*, (C.A.4, 1976), 530 F.2d.580; *Baerga* v *Richardson* (C.A.5,1974), 500 F.2d. 309, Cert. denied 420 U.S. 931 (1975).

The Court below failed to consider Sections 404.1525(a),(b)(1) of the Secretary's Regulations (20 C.F.R. Sections 404.1525(A),(B)(1),(1983), which in pertinent part provide:

"(a) Purpose of the Listing of Impairments. The Listing of Impairments describes. . . for all others, the evidence must show that the impairment has lasted or is expected to last for a continuous period of at least 12 months.

"(b) Adults and Childhood diseases. The Listing of Impairments consist of two parts:

(1) *Part A* contains medical criteria that apply, to adult persons age 18 and over. . . .

(2) *Part B* contains additional medical criteria that apply only to the evaluation of impairments of person under age 18. . . ."

Thus, the continuous period should be twelve (12) months and not 300 months as stated at footnote No. 3 of the Court below.

(A-4, page 9).

According to the Social Security Act, the retroactive period of benefits are of twelve (12) months at time of filing of application not to 300 months as stated by the Court below.

"Congress conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain section of the Act. The Secretary's definition of a term is 'entitled to more than mere deference or weight', and is instead entitled to 'legislative effect' because Congress entrust to the Secretary rather than the Courts the primary responsibility for interpreting the statutory term."

Batterton v *Francis*, 432 U.S. 416, 425-26, 97 S. Ct. 2399, 2405-06, 53 L.Ed. 2d. 448, (1977).

Schweiker v *Gray Panthers*, 453 U.S. 34, 43, 101 S. Ct. 2633, 2640, 69 L.Ed. 2d. 460, (1982).

This case was not appealed by the undersigned counsel; but by the Secretary three (3) days before the time-limit of sixty (60) days to appeal. The U.S. District Court reversed the Secretary's denial decision.

The case cited by the Court below, *Caraballo* v *Secretary of H.H.S.*, (1st.Cir.,1981) No. 80-1696 is misplaced. (A-4, page 12).

"As a party to the litigation, Miss Suarez and her legal representative were entitled to due process clause as protected by the Fifth and Fourteenth Amendments of the Constitution of the United States, the essence of which is a fair review before a tribunal free from bias or prejudice."

In Re Murchison, 349 U.S. 133, 136-37, 75 S.Ct. 623, 625-26, 99 L.Ed. 942 (1955).

The record is clear that, at the time the Court issued the reprimand, the Court had decided the merits of the case, even though there had been no trial.

"Tribunals of the Country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial. . . . *Baerga* v *United States* 255 U.S. 22, 35-36, 41 S.Ct. 230, 234, 65 L.Ed. 481, (1921).

This Honorable Court should determine if the Secretary's determination was supported by substantial evidence. *Richardson* v *Perales* 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed. 842 (1971).

"The Court below may not reweigh the evidence or substitute its own judgment for that of the Secretary."

Salinas v *Schweiker* (5th.Cir.,1981), 662 F.2d. 345.

If this case is frivolous, why the Court below took from September 1984 to February 25, 1985 to decide it?

The Great Architect of the Universe knows that all appeals before the Court below are filed in good faith.

On April 08, 1985 we filed a Motion to Stay Mandate within 7 days time limitations from the denial of the Rehearing dated April 3, 1985, pursuant to Rule 41(a) Rules of Appellate Procedure. (A-6). We sent it by Express Mail. (A-6(A)).

On April 09, 1985 the Court below denied above motion. (A-7)).

We are of the opinion that the Court below abused of its discretion.

4. WHETHER AN EMPLOYEE OF THE SOCIAL SECURITY ADMINISTRATION SHOULD BE ALLOWED TO REPRESENT THE SECRETARY OF HEALTH AND HUMAN SERVICES SIGNING APPEALS WITHOUT DUE APPOINTMENT AS COUNSELOR?

On March 29, 1984 Ms. Lillie Price, Attorney, Office of the General Counsel, Social Security Division, Department of Health and Human Services, Room 635 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235 submit-

ted the statement of issue on appeal pursuant to F.R.A.P. Rule 30(b).

On April 11, 1984 Mr. John M. Sacchetti Chief, Retirement and Survivor Insurance Litigation Branch, Office of the General counsel, Social Security Division, Department of Health and Human Services, 6401 Security Boulevard, Baltimore, Maryland 21235, filed Brief and Appendix to Brief of Defendant-Appellant.

On April 18, 1984 Mr. John M. Sacchetti signed Motion for leave to Amend Designation of Appendix on Appeal.

Much of the Defendant-Secretary's argument as to the standard utilized in the First Circuit relies on some unpublished decisions of various Federal District Courts which he has attached to her brief. The First Circuit rules are explicit in stating that unpublished memoranda and opinions of any court "are never to be cited in unrelated cases, unless they are in the process of being published." 1st. Cir., Rule 14.

Mr. John M. Sacchetti, according to our best knowledge and belief, is not a member as a counselor of the Office of the General Counsel, Social Security Division, Department of Health and Human Services.

Only Counsel of record shall enter an appearance.

Ms. Lillie Price, Attorney, is the only counselor of record according to the entry of March 29, 1984.

We have never received any communication from Mr. Sacchetti that he is the Counsel of record.

Therefore, all documents signed by him should not be taken into consideration.

CONCLUSION

For the reasons aforesaid, it is respectfully prays that the Writ of Certiorari be granted and the judgment from the U.S. Court of Appeals for the First Circuit be vacated and that the OPINION and ORDER from the U.S. District Court for the District of Puerto Rico reversing the case to the Secretary of Health and Human Services be sustained.

Respectfully submitted,

RAFAEL CARRERAS-VALLE, Esq.
Counsel for Petitioner
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Phone (809) 767-5665

May 31, 1985.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CARMEN M. SUAREZ,

Petitioner

v.

MARGARET M. HECKLER,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that on this same date a copy of this Writ of Certiorari was mailed to:

Hon. Rex E. Lee
U.S. Solicitor General
Department of Justice
Washington, D.C. 20530

Hon. Daniel F. López Romo
U.S. District Attorney
Federal Office Building
Room 101
Carlos Chardón Avenue
Hato Rey, Puerto Rico 00918

RAFAEL CARRERAS-VALLE, Esquire
Counsel for Petitioner

APPENDICES

APPENDIX A

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Francis P. Scigliano
Clerk

1606 John W. McCormack
Post Office & Courthouse
Boston, Mass. 02109
(617) 223-2888

April 16, 1985.

Rafael Carreras-Valle, Esquire
P.O. Box 20399
Río Piedras, PR 00928

Re: No. 84-1143. Carmen M. Suarez v. Secretary of Health and Human Services.

Dear Sir:

Your notice of appeal to the Supreme Court has been received and filed.

Pursuant to a directive from the Office of the Clerk of the Supreme Court, rather than sending a copy to the Supreme Court Clerk's Office, I return to you a copy of your notice of appeal showing the date filed in this office. I am advised that you should include this copy of your notice of appeal in the appendix to your jurisdictional statement when you file that document with the Clerk of that Court.

By the Court:

(s) Francis P. Scigliano
Clerk.

FPS/1jr
Enclosure

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1143

CARMEN M. SUAREZ,
Plaintiff, Appellant,

V.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Defendant, Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that CARMEN M. SUAREZ, the Plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final order dismissing the Complaint entered in this action on February 25, 1985; Petition for Rehearing was denied on April 03, 1985.

This appeal is taken pursuant to 28 U.S.C.A. Section 1254(1).

At Río Piedras, Puerto Rico, April 10, 1985.

RAFAEL CARRERAS-VALLE, Esq.
Counsel for Plaintiff-Appellant
P.O. Box 20399
Río Piedras, P.R. 00928
PHONE (809) 767-5665

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that on this same date, a copy of this NOTICE, was mailed to:

Hon. Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

Hon. Daniel López Romo
U.S. District Attorney
Federal Office Bldg.
Room 101
Carlos Chardón Avenue
Hato Rey, P.R. 00918

(s.t.) RAFAEL CARRERAS-VALLE, Esq.
Counsel for Plaintiff-Appellant

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1143

CARMEN M. SUAREZ,
Plaintiff, Appellees,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Defendant, Appellant.

JUDGMENT
Entered: February 25, 1985

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by Counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is reversed.

By the Court:

(s) FRANCIS P. SCIGLIANO
Clerk.

(cc: Messrs. Sanchetti, Carreras-Valle, Coleman and Suarez)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1143

CARMEN M. SUAREZ,

Plaintiff, Appellee,

VS.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

(Hon. Juan M. Perez-Gimenez, *U.S. District Judge*)

Before

Campbell, *Chief Judge*,
Coffin and Bownes, *Circuit Judges*.

John M. Sacchetti, Chief, Retirement and Survivors Insurance Litigation Branch, *Lillie Price*, Office of the General Counsel, *Richard K. Willard*, Acting Assistant Attorney General, *Daniel F. López Romo*, United States Attorney, *Francisco A. Besosa*, Assistant United States Attorney, and *Randolph W. Gaines*, Deputy Assistant General Counsel for Litigation, on brief for appellant.

Rafael Carreras-Valle on brief for appellee.

February 25, 1985

Per Curiam. The Secretary of Health and Human Services appeals the district court judgment reversing the Secretary's denial to appellee Carmen Suarez of benefits under the child disability provisions of the Social Security Act.

Appellee, born on July 30, 1926, fifty-five years old at the date of the hearing in 1982 before the Administrative Law Judge, Claims disability from manic depressive psychosis and neurosis since age 12. The record[1] reveals that she suffered her first serious depressive episode at around age twelve. Two additional depressive episodes, at around age eighteen, culminated in claimant's hospitalization in September of 1944 at the Ontario Hospital (now London Psychiatric Hospital) in Canada where the disorder was diagnosed as manic depressive psychosis. Ms. Suarez underwent electroshock and insulin treatments while at Ontario and after some improvement was transferred on January 1, 1945 to the Institute of Living in Hartford, Connecticut, where she also received shock treatments and was institutionalized for a full year until January of 1946. On discharge, she was reported as having been "stabilized" for three to four months and her prognosis appeared "fairly good."

On returning to Puerto Rico she returned to the care of the doctor who had treated her in the past. After many years died and his record were destroyed. There was thus no medical evidence from 1946 until claimant was again hospitalized in 1972 and in 1973 in the Hato Rey Psychiatric Hospital in Puerto Rico, with a diagnosis of "*Schizophrenia*, Schizo-affective type, chronic." The only testimony before the A.L.J. was that

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[1]The record of hospitalizations between 1944 and 1946, and in 1972 and 1973, reflects the painstaking efforts of the local social security officials charged with accumulating as much of a record as possible for making disability determinations.

of claimant, although claimant's sister, who had always lived with her except during claimant's time in Canada and Hartford, accompanied her to the hearing. She told of her hospitalization and shock treatments in Canada, her year in Hartford, and of the 26 intervening years before her 1972 hospitalization. She spoke without reference to specific years, describing bouts of depression and spells of euphoria, suicide attempts, and medications taken. Her testimony occupied one half hour and 20 pages of transcript.

On the basis of this evidence, the A.L.J. denied claimant's application for child's disability insurance benefits. The A.L.J. held that Ms. Suarez was not disabled within the meaning of Section 202(d)(1) of the Act, 42 U.S.C.S. 402(d)(1), because, although her condition between 1944 and 1946 (prior to her twenty-second birthday on July 30, 1948) was "severe", she failed to prove the condition subsisted *continuously* thereafter. The A.L.J. further held that Suarez could not recover benefits exclusively for a "closed period of disability for her severe condition" in 1944-46 because of the amount of time which had elapsed between 1946 and 1981, when she filed her application for benefits.

Subsequently claimant requested review by the Appeals Council. In support counsel forwarded three substantive documents. The first was a September 1981 report from claimant's current psychiatrist, Dr. Nieves, describing the early hospitalizations and giving his opinion that she "had never get (sic) a complete recovery since initial appearance of symptoms" and that "(h)er behavior . . . had always prevailed the primary symptoms of psychopatology (sic)." The second was an affidavit of a former judge and neighbor of claimant to the effect that on several occasions since 1941 he had heard her screaming, and that he understood from claimant's parents that she refused to leave her room and was in deep depression for long periods of time.

The third and most relevant document was a written statement from claimant's sister who had been silent at the hearing

before the A.L.J. Her statement gave the only significantly corroborative information about claimant's condition from 1946 until 1972. The gist of it was that claimant, on returning to Puerto Rico began a two year secretarial course. Because of her varying "highs and lows," she would secure very good grades at times and would fail courses at other times. It took her four to five years to complete the course. Subsequently she held jobs for only brief periods. "(f)rom then on, she spent most of her life locked up in the house. . . .

. . . . " The Appeals Council concluded that neither the sister's statement nor those of the neighbor and Dr. Nieves would alter the A.L.J.'s decision and denied the request for review.

The district court, relying on *Axe* v. *Harris*, 503, F. Supp. 1049 (E.D. Pa. 1980), *after remand*, *Axe* v. *Department of Health and Human Services*, 564 F. Supp. 789 (E.D. Pa. 1983), rejected the Secretary's—and the A.L.J.'s—view that to be entitled to child's disability insurance benefits claimant must have suffered from a disability continuously from before age 22 until the time benefits were sought. It was enough that claimant was disabled prior to reaching age 22 and that she suffered the same disability when she applied for benefits. The Court accordingly reversed the Secretary's decision.

We find ourselves in the uncomfortable position of concluding that the Secretary committed no error of law or abuse of discretion while at the same time harboring the haunting suspicion that claimant's case was not fully and fairly presented.

We begin by making clear that claimant's mental condition from 1944 to 1946 is relevant only in relation to the question of whether her disability *commenced* prior to her twenty-second birthday and thus to her right to recover benefits for any disability subsequent to whenever her father's insured status came within the provisions of the Act. The A.L.J.'s characterization of Ms. Suarez's condition during that time as "severe" and the fact that the A.L.J. considered the possibility of granting her benefits for a closed period between 1944 and

1946, leaves no doubt that claimant was disabled within the meaning of the Act before age 22.

Next, we consider the nature of the child's benefits provisions of the Social Security Act. They were enacted to protect any child financially dependent on an insured wage earner in the event that wage earner becomes unable to continue providing for the child's support. See *Adams* v. *Weinberger*, 521 F.2d. 656, 659 (2nd. Cir. 1975). Thus, under certain statutorily defined circumstances, the law grants benefits to "(e)very child . . . of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual," 42 U.S.C. § 402(d)(1).[2] To be eligible for benefits the child must file an application, be unmarried, be dependent on the wage earner, and be either less than eighteen years old, less than nineteen years old and a full-time student, or be "under a disability (as defined in section 444(d) of this title) which began before he attained the age of 22 . . . ." *Id.* The regulation implementing this part of the statute contains identical requirements. *See* 20 C.F.R. § 404.350.

The question is whether this Section of the Act requires a claimant to prove a *continuous, uninterrupted* disability after age twenty-two. The legislative history of this provision lends support to the Secretary's stance. Senate Report No. 2133 mentions recognition of "the situation faced by people who have the care of a child who because of mental deficiency *never* grows up, or who because of a physical impairment requires constant care *throughout his life*." 84th Cong., 2d. Sess. 2, *reprinted in* 1956 U.S. Cong. & Ad. News 3881 (emphasis added). Likewise, after discussing ways in which childhood disability could be established, the Report concludes that "the difficulty involved in determining that he was totally disabled before age 18 (now 22) and *has remained* so will not be substantial." Id. at 3882

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[2]This threshold requirement is obviously satisfied in this case. Although we have no information as to when claimant's father became eligible for such benefits, claimant testified that her insured father died some two months before her hearing.

(emphasis added). The Report thereafter refers to the child as being "permanently and totally disabled since before he reached" the critical age, now 22. *Id.* at 3877; so also does the House Report. H.R. Rep. No. 1189, 84th Cong., 2d Sess. 2, at 8, 24-25.

In light of this history and the wording of the statute we cannot say that the Secretary's interpretation is plainly wrong or patently inconsistent with the controlling statute. *Lybarger* v. *Cardwell*, 577 F. 2d 764, 766 (1st.Cir. 1978). We note also that the only circuit court opinions which have been called to our attention have registered similar views. *Reading* v. *Mathews*, 542 F. 2d 993, 997 (7th.Cir. 1976); *Futernick* v. *Richardson*, 484 F. 2d. 647, 648 (6th Cir. 1973); *Reyes* v. *Secretary of Health, Education and Welfare*, 476 F. 2d. 910, 914 (D.C. Cir. 1973).[3]

We therefore hold that the A.L.J. was guided by the proper standard in looking for evidence of claimant's continuing total disability after 1946. We also hold that the evidence before the A.L.J. supported her conclusion that such disability had not been shown. Filling in the long hiatus between 1946 (the Hartford institutionalization) and 1972 (the first Hato Rey hospitalization) were only claimant's brief, general, and somewhat disjointed comments made without reference to specific periods. Nor can we hold that the Appeals Council abused its discretion in denying claimant's request for review and in con-

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[3]We view the reasoning from *Axe* v. *Harris*, 503 F. Supp. 1049 (E.D. Pa. 1980), relied on by the district court, as being fatally flawed, not only in disregarding all but one of the cases cited in the text and the legislative history, but in seeking support in a reentitlement regulation, 20 C.F.R. § 404.351. The most favorable part of this regulation allows a child who has been granted benefits but whose entitlement has terminated to become reentitled if his disability recurs within 84 months of the prior cessation of disability. But in the case of claimant, more than 300 months elapsed between January, 1946, when she was released from the Hartford institution and July, 1972, when she was hospitalized at Hato Rey. If, therefore, claimant were to prevail, she, a new claimant, would receive more favorable treatments than the law accords to one who once was fully entitled and seeks to become reentitled. Such a result would indeed be perverse.

cluding that the several statements submitted would not have altered the A.L.J.'s recommendation.

This brings us to our strong feeling that the assistance claimant received from her counsel was too little, too late, or both. As we have noted, the only helpful medical reports were obtained by the social security officials. Counsel's contribution to the presentation of the case was not apparent from the hearing. It is inconceivable to us why claimant's sister, who had lived with her for most of their joint lives, was not asked to testify orally—and in much greater detail—to what she later subscribed to in writing before the Appeals Council.[4] If in fact claimant had continuously been totally disabled since her return to Puerto Rico in 1946, some corroborative evidence from neighbors and other family members might be thought to have been available. School and employment records would also have been helpful. And, with fairly detailed medical observations recorded during 1944 and 1945, supplemented by lay testimony of claimant's conduct thereafter, a psychiatric expert might have been able to give a credible opinion of the nature and probable degree of claimant's continuing manic-depressive disability.

As it happened, the A.L.J. had nothing before her but the hospital reports, with a 26 year gap between them, and a psychotic claimant's general responses to the A.L.J.'s questions. In a belated effort to supply something more, claimant's counsel sent the several general statements we have described to the Appeals Council. While not compelling, they suggest that an opportunity to elicit valuable testimony had been allowed to slip by.

We do not suggest that the A.L.J. failed in her responsibility to develop the facts. *Richardson* v. *Perales*, 402 U.S. 389, 410

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[4]While such evidence may lack the strength of medical reports, it must be considered and may be useful if it is consistent with past and present medical diagnoses. *Basinger* v. *Heckler*, 725 F. 2d. 1166 (8th. Cir., 184); *Tieniber* v. *Heckler*, 720 F. 2d. 1251 (11th Cir. 1983); *Kelly* v. *Matthews*, 420 F. Supp. 359 (W.D. N.C.-1976).

(1971). The claim involved an illness dating back almost four decades; it may thus not have been surprising that no corroborative testimony was forthcoming, particularly since claimant was represented by counsel. The A.L.J. did not know, for example, that claimant's sister had lived under the same roof with claimant for most of her life. As for counsel's performance, or lack of it, we have already noted our dissatisfaction.

We add one further fact. In May of 1981, in a per curiam opinion in another social security appeal, *Caraballo* v. *Secretary of Health and Human Services*, No. 80-1696 (1st.Cir.,1981), we admonished the same attorney to desist from bringing frivolous appeals which "amounted to little more than pleas that we retry the administrative case." Our problem here is that the appeal, while perhaps not legally frivolous, is clearly vulnerable because of the absence of any discernible efforts by counsel to flesh out the record at the administrative level.

We therefore suggest that the interest of justice may well be served in this case if the Secretary would accord to another attorney, if requested, the privilege of attempting to supplement the record by detailed submissions to the Appeals Council, with the possibility of a reopened hearing before an A.L.J.

The judgment is reversed; a copy of this opinion to be sent to the General Counsel, Department of Health and Human Services. The Clerk is directed to mail a copy of this opinion to claimant.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1143

CARMEN M. SUAREZ,
Plaintiff, Appellees,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Defendant, Appellant.

Before
Campbell, *Chief Judge*
Coffin and Bownes, *Circuit Judges.*

ORDER OF COURT

Entered April 3, 1985

The petition for rehearing is denied.

By the Court,

(s) FRANCIS P. SCIGLIANO
Clerk.

(cc: Messrs. Besosa, Sacchetti and Carreras-Valle)

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1143

CARMEN M. SUAREZ

Plaintiff, Appellee,

VS.

SECRETARY OF HEALTH AND HUMAN SERVICES

Defendant, Appellant.

MOTION TO STAY OF MANDATE

APPELLEE MOVES this Honorable Court to enter an ORDER for staying the issuance of its Mandate in appeal to the U.S. District Court for the District of Puerto Rico for a period of thirty (30) days after April 03, 1985, or until further Order of this Court, or until Order of the United States Supreme Court on Appellee's Petition for Writ of Certiorari from Order of this Court, dated April 03, 1985. Rule 41(b), Rules of Appellate Procedure.

At Río Piedras, Puerto Rico, April 8, 1985.

(s.t.) RAFAEL CARRERAS-VALLE
Counsel for Plaintiff-Appellee
P.O. Box 20399
Río Piedras, P.R. 00928
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FROM:

LCDO. RAFAEL CARRERAS-VALLE
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Customer Number, If any:

TO: HON. FRANCIS P. SCIGLIANO
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FOR THE FIRST CIRCUIT
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LILLIE PRICE
Attorney
Office of the General Counsel
Social Security Division
Dept. of H.H.S.
6401 Security Blvd. Rm 622
Baltimore, Maryland 21235

Hon. Daniel López Romo
U.S. District Attorney
Federal Office Bldg. Room 101
Carlos Chardón Avenue
Hato Rey, Puerto Rico 00918

(s.t.) RAFAEL CARRERAS-VALLE, Esquire
Counsel for Plaintiff, Appellee

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1143

CARMEN M. SUAREZ,
Plaintiff, Appellees,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Defendant, Appellant.

ORDER OF COURT

Entered: April 9, 1985

Upon consideration of Appellee's "Motion to Stay of Mandate".

It is ordered that said motion be and the same hereby is denied.

By the Court,

(s) FRANCIS P. SCIGLIANO
Clerk.

(cc: Messrs. Sacchetti and Carreras-Valle)

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

581-05-0194

CARMEN M. SUAREZ,
Plaintiff,

VS. **Civil No. 82-2246(PG)**

SECRETARY OF HEALTH AND
HUMAN SERVICES,
Defendant.

JUDGMENT

The Court through the Hon. Juan M. Pérez-Giménez, has entered an Order on December 16, 1983 reversing the decision of the Secretary of Health and Human Services,

WHEREFORE, IT IS ORDERED AND ADJUDGED that the decision of the Secretary be and it is hereby reversed.

SO ORDERED.

In San Juan, Puerto Rico, this 19th day of December, 1983.

RAMON A. ALFARO
Clerk of the Court

(s.t.) IRMA R. VALLDEJULI
Deputy Clerk

APPENDIX J

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CARMEN M. SUAREZ,
Plaintiff,

v. **Civil No. 82-2246(PG)**

SECRETARY OF HEALTH AND HUMAN SERVICES,
Defendant.

OPINION AND ORDER

Plaintiff, Carmen M. Suarez, filed this action under 42 U.S.C. 405(g) seeking judicial review of the adverse decision rendered by the Secretary of Health and Human Services (the Secretary) on her claim for Child's Disability Insurance Benefits. The findings of the Secretary are conclusive only if supported by substantial evidence. *Pellevia* v. *Celebrezze*, 226 F. Supp. 176 (D.C.La. 1964). Substantial evidence "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson* v. *Perales*, 402 U.S. 389 (1971), quoting from *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938).

After careful and independent review of the record and the memorandum filed in support thereof this Court holds that the Administrative Law Judge (ALJ) erred in requiring a period of continuous disability from the time when the plaintiff first became disabled to the date when she filed for benefits.

An individual is entitled to Child's insurance benefits if he/she:

1. Has filed an application for child's insurance benefits.
2. was the child of a person insured under the Act
3. was dependent on the insured person

4. was unmarried at the time the application was filed, and

5. at the time the application was filed the Claimant was suffering from a disability that began before age 22.

42 U.S.C. 402(d)(1), 20 C.F.R. 404.350.

A disability must be such as to render the Claimant unable to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1). Carmen M. Suarez filed an application at the Social Security Administration on April 28, 1981 for child's disability benefits under her father's account alleging disability since age twelve due to manic depressive neurosis and psychosis. The application was denied initially on August 1981 and on reconsideration on October 1981. The applicant filed a timely request for a hearing, which was held before an ALJ on March 8, 1982.

The medical reports and testimony of the applicant reveal the facts that follow. Carmen M. Suárez was born on July 30, 1926, in Puerto Rico, where she lived with her family. At age 18, in 1944, she became psychotic and was hospitalized at the London Psychiatric Hospital in Ontario, Canada. She was subsequently transferred on January 1, 1945, to the Institute of Living, in Connecticut, where she was diagnosed as manic depressive psychotic. After one year and four months of hospitalization abroad, she returned to Puerto Rico and to treatment with her former psychiatrist, Dr. Morales García. While she was being treated by Dr. Morales García she spent the majority of her life in isolation, mostly inside the home. After Dr. Morales passed away the claimant was institutionalized in July 1972 and again in 1973, at the Hato Rey Psychiatric Hospital, in Puerto Rico.

The ALJ found that the evidence of record failed to "prove that at least on July 1948 and thereafter she was suffering from a severe impairment". Furthermore, according to the ALJ a

closed period of disability for her severe condition in 1944 through 1946 is not in order as more than 34 years elapsed from 1946 to the date of the filing for the benefits.

A recent decision, *Axe* v. *Harris*, 503 F.Supp. 1049 (E.D.Pa. 1980) has held that in a case of child's disability benefits nothing in the Social Security Act (the Act) requires that the disability be continuous from the time the claimant first becomes disabled to the time he files for benefits. *Axe* explained that Section 404.351 of the Code of Federal Regulations "clearly contemplates through the use of the word 'reentitlement' that a claimant may, at times, not be disabled after a period of disability and then, once again, become unable to engage in substantial gainful employment." *Axe*, *supra*, at 1051.

Section 404.351 of C.F.R. even provides benefits for child's insurance claimants in that type of situation:

> "If your entitlement to childs benefits has ended you may be reentitled to the same earnings record if you have not married and if you apply for reentitlement. Your reentitlement may begin with
>
> "(a) . . . .
>
> "(b) the first month in which you are disabled if your disability began before you became 22 years old; or
>
> "(c) . . . ."

A requirement that a period of disability be uninterrupted prior to age 22 until the time that the application is filed would be to negate the meaning of the Act. 42 U.S.C. 405(g) and 404.350 of C.F.R. *Axe* v. *Harris*, *supra*; cf. *Reading* v. *Matthews*, 542 F.2d 993 (7th Cir. 1976).

The overwhelming weight of medical evidence demonstrates that the plaintiff has fulfilled the necessary requirements to obtain child's benefits as she was statutorily disabled prior to age 22 and again when she applied for the benefits on April 1981. Clinical notes drafted at the Institute of Living, in Connecticut, disclose a weekly account of the severity of plaintiff's

illness during her stay at that hospital in 1945, when she was 18. During that time Ms. Suárez was in a state of constant depression, was seclusive and apathetic, had suicidal tendencies, and had to be continually observed. The treatment at this institute consisted of two weekly electroshocks and medication. Upon her discharge in 1946 it was reported that her prognosis appeared "fairly good". She came back home to Puerto Rico and continued to be treated by Dr. Morales until his death. She went to the University of Puerto Rico in hope of completing a two-year secretarial degree. Because of her emotional imbalance it took her five years to finish school. The plaintiff held a few jobs which she was unable to keep except for very short periods of time. The record indicates she lived in isolation and spent most of her life confined to the home. Dr. Pedro Nieves diagnosed her case as "chronic schizophrenia". In the psychiatric report dated September 9, 1981, Dr. Nieves opined that the claimant was circumscribed to her specific needs and did not tolerate stressful situations. He concluded that the patient's "possibilities of work (were) nil" and that she would need indefinite psychiatric treatment with the aid of medication. It is clear that the same disability was present in the claimant prior to attaining age 22, as on April 1981, when she applied for the benefits.

Accordingly, this case is REVERSED to the Secretary.

IT IS SO ORDERED.

San Juan, Puerto Rico, December 15, 1983.

(s.t.) JUAN M. PEREZ-GIMENEZ
U.S. District Judge

below. Accordingly, the decision of the district court should be affirmed.

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